

STEVEN A. GIBSON
Nevada Bar No. 6656
sgibson@gibsonlowry.com
JODI DONETTA LOWRY
Nevada Bar No. 7798
jdlowry@gibsonlowry.com
J. SCOTT BURRIS
Nevada Bar No. 10529
sburris@gibsonlowry.com

GIBSON LOWRY BURRIS LLP
City Center West
7201 West Lake Mead Boulevard
Suite 503
Las Vegas, Nevada 89128
Telephone 702.541.7888
Facsimile 702.541.7899

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KABINS FAMILY LIMITED
PARTNERSHIP, a Nevada limited
partnership; LORI C. KABINS, as trustee for
the LORI C. KABINS SEPARATE
PROPERTY TRUST, a Nevada trust,

Plaintiffs,

v.

CHAIN CONSORTIUM, a Nevada general
partnership; 3900, LLC, a Nevada limited-
liability company; 99TH & INDIAN
SCHOOL, LLC, a Nevada limited-liability
company; 99TH & INDIAN SCHOOL
MANAGEMENT, LLC, a Nevada limited-
liability company; BENESSERE, LLC, a
Nevada limited-liability company;
BENESSERE MANAGEMENT, LLC, a
Nevada limited-liability company; TODD W.
BERGMAN, an individual; BUCKEYE

Case No.: 2:09-CV-1125-PMP-(RJJ)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS', EDWARD GUTZMAN,
III'S AND GE III, LLC'S, MOTION TO
DISMISS; AND**

**OPPOSITION TO JOINDERS BY
DEFENDANTS BENESSERE
MANAGEMENT, CIPRIANI
MANAGEMENT, AND MR. TODD W.
BERGMAN**

1 CANAMEX 77 ONE, LLC, a Nevada limited-
2 liability company; BUCKEYE 80 WEST
3 THREE, LLC, a Nevada limited-liability
4 company; CAPRI I, LLC, a Nevada limited-
5 liability company; CAPRI II, LLC, a Nevada
6 limited-liability company; JEFF CHAIN, an
7 individual; LINDA CHAIN, an individual;
8 JEFF AND LINDA CHAIN, as trustees for the
9 JEFF & LINDA CHAIN FAMILY TRUST, a
10 Nevada trust; CIPRIANI, LLC, a Nevada
11 limited-liability company; CIPRIANI
12 MANAGEMENT, LLC, a Nevada limited-
13 liability company; COTTONWOOD RETAIL,
14 LLC, a Nevada limited-liability company;
15 GEIII, LLC, also known as GE III, LLC, a
16 Nevada limited-liability company; GILA
17 BEND 384, LLC, a Nevada limited-liability
18 company; EDWARD GUTZMAN III, an
19 individual; INNOVATIVE ASSETS, LLC, a
20 Nevada limited-liability company; J.
21 MATTHEW KAMMEYER, an individual;
KAN INVESTMENTS, LLC, a Nevada
limited-liability company; GABRIEL
MARTINEZ, ESQ, an individual;
MICHAEL'S PLAZA, LLC, a Nevada
limited-liability company; MILLENNIUM
CONSTRUCTION, INC. doing business as
MCI, a Nevada corporation; MILLENNIUM
COMMERCIAL PROPERTIES, LLC, a
Nevada limited-liability company;
MILLENNIUM PROPERTIES &
DEVELOPMENT, INC. a Nevada
corporation; MODERN MANAGEMENT,
INC. a Nevada corporation; PHOENIX 83RD,
LLC, a Nevada limited-liability company;
ALLYN F. POVILAITIS, also known as
ALLYN F. POVILATIS, an individual;
RCRE, LLC, a Nevada limited-liability
company; and T.W.B. ENTERPRISES, INC.,
a Nevada corporation,

Defendants.

1 Plaintiffs, the Kabins Family Limited Partnership and the Lori C. Kabins Separate
2 Property Trust (collectively, “Kabins”), by and through Kabins’ counsel, Gibson Lowry Burris
3 LLP, oppose Defendants, Mr. Edward Gutzman, III’s (“Mr. Gutzman’s”), and GE III, LLC’s
4 (“GEIII’s”) (collectively, “Gutzman’s”) Motion to Dismiss (Docket No. 83, “Gutzman’s
5 Motion”) pursuant to Fed. R. Civ. P. 12(b)(6), 8(a)(2), and 9(b). Additionally, Kabins opposes
6 the joinders to Gutzman’s Motion filed by Mr. Todd W. Bergman (Docket No. 109), Benessere
7 Management, LLC, (Docket No. 88) and Cipriani Management, LLC (Docket No. 88).

8 Kabins requests that Mr. Gutzman’s Declaration be excluded (Gutzman’s Motion at Ex.
9 1) pursuant to Fed. R. Civ. P. 12(d), for purposes of ruling on Gutzman’s Motion, because
10 Gutzman moves for dismissal pursuant to Rule 12(b)(6), which cannot be based on factual
11 disputes. Mr. Gutzman’s Declaration merely serves to assert extrinsic facts that Kabins almost
12 entirely disputes. (Gutzman’s Motion at Ex. 1). However, if the Court treats Gutzman’s Motion
13 “as one for summary judgment under Rule 56,” based on Mr. Gutzman’s Declaration, then
14 Kabins must be allowed “a reasonable opportunity to present all the material that is pertinent to
15 the motion,” before the Court rules on Gutzman’s Motion so that Kabins may offer facts in
16 dispute of Gutzman’s Declaration. Fed. R. Civ. P. 12(d).

17 Plaintiffs’ Opposition is based on the following Memorandum of Points and Authorities,
18 on the pleadings and papers on file herein, on the oral argument of counsel to be adduced at
19 hearing, and on any other matter this Court wishes to take into consideration.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Gutzman is not entitled to dismissal because Kabins' Complaint unequivocally alleged sufficient detail for every element of every claim against Gutzman. Additionally, where Kabins' claims included averments of fraud, Kabins' alleged specific facts showing who (*i.e.*, which one of the co-conspirators), what, where, and when the conspiring Defendants committed fraud. Essentially, Kabins' Complaint alleged that Mr. Gutzman and GEIII are central co-conspirators that orchestrated and implemented a series of seven interrelated complex schemes to defraud Kabins out of approximately \$11 million over a period of five years.¹ Gutzman cannot be entitled to co-create such a complicated scheme to defraud Kabins out of approximately \$11 million, and then protest that the scheme is too complex for Gutzman to understand the scope of Gutzman's liability.

Despite the 46 causes of action at issue, the Court should only address, at most, the twelve causes of action enumerated in Gutzman's Motion, which are comprised of two sets of claims: (1) the five fraud-related claims, which are subject to heightened pleading requirements; and, (2) the seven breach-of-the-duty-of-loyalty claims, which are not subject to heightened pleading.² Gutzman explicitly admitted to receiving notice of all "46 ... causes of action arising from . . . 7 different real estate development projects."³ Thus, even though Gutzman alludes that

¹ The Court should note that Gutzman's Motion attempts to conflate and confuse the issues by beginning with a false premise: Gutzman misrepresented to the Court that all 46 causes of action are "against all defendants." (Gutzman's Motion at 5:20-22). To be clear, however, Kabins' Complaint alleges 46 causes of action against Mr. Gutzman, and 22 of those causes of action are also against GEIII, arising mostly out of conspiracy claims.

² Gutzman's Motion at 10:5-7, 22-24, 11:3-5. Only one of breach-of-loyalty claims pertains to both Mr. Gutzman and GEIII. (Compl. ¶ 600, breach of loyalty against the "Gila Bend Defendants").

³ Gutzman's Motion at 5:20-21.

1 Kabins' entire Complaint should be dismissed,⁴ Gutzman only identifies twelve causes of action
2 for dismissal; and only six of those are against GEIII. Indeed, Gutzman failed to respond either
3 by motion or by responsive pleading to any of the conspiracy-related claims,⁵ the securities fraud
4 claims, the racketeering claims, or the contract-based claims.⁶ Notably, many of those claims do
5 not require heightened pleading because those claims do not aver fraud.

6 In sum, Kabins provided sufficient detail of the fraud committed by: (1) Gutzman's co-
7 conspirators; *and* (2) Mr. Gutzman. The allegations of fraud committed by Gutzman's co-
8 conspirators alone are sufficient to deny Gutzman's Motion regarding the fraud claims because
9 Gutzman is liable for the co-conspirators' fraud. Additionally, the fraud committed by Mr.
10 Gutzman provides another independent basis for why Gutzman's Motion must be denied.
11 Moreover, Gutzman's only argument that the *non*-fraud claims (breaches of the duty of loyalty)
12 should be dismissed is based entirely on a single disputed fact denying Mr. Gutzman's
13 partnership, as opposed to any standard for a motion to dismiss. For purposes of a motion to
14 dismiss, however, Mr. Gutzman *is* a general partner of the Chain Consortium.⁷ In sum,
15 Gutzman's Motion, *in toto*, must be denied.

16 The joinders to Gutzman's Motion by Defendants Benessere Management, LLC, Cipriani
17 Management, LLC (Docket No. 88) and Mr. Todd W. Bergman (Docket No. 109) are out of
18

19 ⁴ Gutzman's Motion at 2:20, 6:23-24, 11:2-3.

20 ⁵ For example, Gutzman did not address: (2) Conspiracy to Commit Securities Fraud; (3) Civil Conspiracy;
(4) Concert of Action; (5) Aiding and Abetting; (42) Federal RICO; (43) Conspiracy to Violate Federal RICO; and
(44) Nevada Racketeering.

21 ⁶ Kabins categorizes the 16 contract-based claims as follows: seven claims for breach of contract; seven
22 claims for breach of the covenant of good faith and fair dealing; one claim for unjust enrichment; and one claim for
promissory estoppel.

⁷ Compl. ¶ 77.

1 place. Not all of the causes of action are against “All Defendants,” despite Gutzman’s
2 misrepresentation to the contrary.⁸ Notably, not one of the joinders filed in this case (Docket
3 Nos. 88 and 109) delineate which parts of Gutzman’s Motion could apply to the parties seeking
4 to join Gutzman’s Motion, thus, those joinders should be summarily rejected. In any event, the
5 result is the same for the joinders: the claims cannot be dismissed.

6 **II. FACTS**

7 On June 23, 2009, Kabins filed a complaint against Mr. Gutzman, GEIII, and 32 other co-
8 conspirators regarding a complex fraudulent scheme, which caused approximately \$11 million of
9 damage to Kabins. (Docket No. 1-1, “Compl.”) On August 17, 2009, in lieu of filing a
10 responsive pleading, Mr. Gutzman and GEIII, moved to dismiss 12 enumerated claims against
11 Mr. Gutzman; six of those claims are also against GEIII, which is one of Gutzman’s co-
12 conspirators. (Gutzman’s Motion at pp. 8-10). Gutzman’s Motion alludes to dismissal of the
13 entire Complaint against Mr. Gutzman and GEIII.⁹ (Gutzman’s Motion at 6:4-5, 6:23-24, 7:15-
14 17). Gutzman did not provide a single example of any allegation in the Complaint that Gutzman
15 finds objectionable. Indeed, Gutzman’s Motion does not contain a single citation to any
16 allegation in the Complaint.

17 On August 20, 2009, Benessere Management, LLC (“Benessere Management”) and
18 Cipriani Management, LLC (“Cipriani Management”) filed a joinder to Gutzman’s Motion.
19 However, neither Benessere Management nor Cipriani Management filed a responsive pleading
20 or a motion pursuant to Fed. R. Civ. P. 12(b). On August 21, 2009, Mr. Todd W. Bergman filed

21 ⁸ Gutzman’s Motion at 5:21.

22 ⁹ A closer examination of Gutzman’s Motion reveals that Gutzman only argued, albeit inadequately, for
dismissal of 12 of the 46 claims.

1 a joinder to Gutzman's Motion. However, Mr. Bergman did not file a responsive pleading or a
2 motion pursuant to Fed. R. Civ. P. 12(b).

3 Kabins alleged that Mr. Gutzman was part of a conspiracy and a general partnership with,
4 at a minimum, the individually-named Defendants and co-conspirators identified as: Mr. Jeff
5 Chain, Gabriel Martinez, Esq., Mr. Allyn Povilaitis, Mr. Todd W. Bergman, Mr. J. Matthew
6 Kammeyer, and Mrs. Linda Chain. (Compl. ¶¶ 27-28, 77, 79-80, 84-85, 94-95, 110-119, 156,
7 179-180, 217, 280, 301, 314, 342, 348, 394, 396-98, 422, 425, 427, 449, 460, 481-82, 492, 495,
8 582, 609, 706, 716, 747). Kabins alleged that the individually-named Defendants—the general
9 partners of the Chain Consortium—operated as a general partnership by, at a minimum, sharing
10 profits and common objectives. (*See, e.g.*, Compl. ¶¶ 221-233 (showing the operations,
11 relationships, shared profits, and shared objectives of the general partners)).

12 Kabins identified and alleged subgroups of conspiring Defendants to which Mr. Gutzman
13 belongs, including: (1) the "Chain Consortium" (Compl. ¶ 77); (2) the "Managers" (Compl. ¶
14 217); (3) Gutzman's agency relationship for the "Millennium Entities" (Compl. ¶ 280, *passim*);
15 and, (4) the subgroups of Defendants associated with, and responsible for, each of the seven
16 investment company schemes (Compl. ¶¶ 555 (the "99th Defendants"), 564 (the "Benessere
17 Defendants"), 573 (the "Capri Defendants"), 582 (the "Cipriani Defendants"), 591 (the
18 "Cottonwood Defendants"), 600 (the "Gila Bend Defendants"), and 609 (the "Michael's
19 Defendants")). Kabins alleged that Mr. Gutzman, individually and through a general partnership
20 referred to as the "Chain Consortium," controlled GEIII (Compl. ¶ 221), which Kabins defined
21 as one of the "Managers" (Compl. ¶ 217). Kabins alleged that GEIII and Mr. Gutzman, who are
22 both "Managers," conspired with, acted in concert with, and aided and abetted the other

Defendants in this case by co-creating and implementing the fraudulent scheme to defraud Kabins. (*See, e.g.*, Compl. ¶¶ 226-230)

A. **Kabins Alleged Fraudulent Omissions and Misrepresentations Regarding the Who, What, When, and Where Addressing Gutzman's Co-Conspirators'**

Kabins alleged affirmative misrepresentations as well as voluminous fraudulent omissions/concealment attributable to Gutzman's co-conspirators. (*See, e.g.*, Compl. ¶¶ 236 and 267 (concealment of illegal kickbacks paid out of Kabins' investments), 281-282 ("risk of loss omission"), 306 (concealment of Michael's rental income deficiency), 309 (concealment of 3900 LLC's ownership of Michael's Plaza), 311-312 (concealment of Michael's leverage risk), 322 (concealment of certain written terms that contradicted oral terms), 326 (misleading K-1s delivered by U.S. Mail), 331 (concealment of loans in general), 371, 375, 385-388, 405 (document-based fraudulent omissions regarding leverage risks, dilution omissions, and loss allocation omissions respectively).¹⁰

In combination with the numerous fraudulent omissions, Kabins' Complaint alleged specificity to answer who, what, where, and when regarding affirmative statements made by Gutzman's co-conspirators. Kabins first alleged generally that:

The Chain Consortium, the Managers, and the Millennium Entities assented to communicating the *Inducement* Misrepresentations to Kabins.

(Compl. ¶ 289) (emphasis added). Kabins alleged that Mr. Gutzman is a general partner of the Chain Consortium (with six other individually-named conspiring Defendants) (Compl. ¶ 77); Gutzman is also a "Manager," as Gutzman partially admits (Gutzman's Motion at 4:12-14)

¹⁰ Notably, there can be no requirement to answer the *where* and *when* associated with the Risk of Loss Omission because, as Kabins alleged, Mr. Gutzman, his partners, and his co-conspirators failed to inform Kabins of the material omission at any time or place (Compl. ¶¶ 281-285).

1 (stating “Mr. Gutzman has acted as a corporate manager for several of the other corporate
2 defendants charged with managing five of the seven real estate developments described in
3 Plaintiff’s Complaint”); and, Mr. Gutzman acted an agent for the Millennium Entities. (*See e.g.*,
4 Compl. ¶ 280).

5 The Inducement Misrepresentations constitute one subgroup of fraudulent statements and
6 omissions consisting of: “[t]he Free and Clear Misrepresentation, Distribution Misrepresentation,
7 Principal Protection Misrepresentation, Liquidity Misrepresentation, and Risk of Loss Omission
8 [.]” (Compl. ¶ 286). Kabins alleged the “who, what, where, and when” regarding each one of
9 the Inducement Misrepresentations. (Compl. ¶¶ 342-343 (“Dates, Locations, and Identities of
10 the Inducement Misrepresentations”)). Additionally, Kabins alleged who, what, where, when,
11 and how much with respect to each investment made by Kabins in reliance on Gutzman and
12 Gutzman’s co-conspirators’ fraudulent scheme. (Compl. ¶ 344).

13 Kabins distinguished between the misrepresentations made directly by Gutzman (*see*,
14 *e.g.*, Compl. ¶ 280) from the misrepresentations made by Gutzman’s co-conspirators (*see, e.g.*,
15 Compl. ¶¶ 251, 258, 268, 276, 281, 286, 342); and Kabins initially alleged who and what the
16 misrepresentations were as well as the context for those misrepresentations. (*See e.g.*, Compl. ¶¶
17 251 (“Free and Clear Misrepresentation”), 258 (“Distribution Misrepresentation”), 268
18 (“Principal Protection Misrepresentation”), 276 (“Liquidity Misrepresentation”). Kabins then
19 alleged where and when regarding each of the misrepresentations. (Compl. ¶¶ 342, “Fraud in the
20 Inducement Dates, Locations, and Identities”).

21 Kabins further alleged who, what, where, and when regarding the fraud in the execution
22 or inception claims. (Compl. pp. 54-58 (it was “Gutzman who told Kabins that . . . attorneys had

1 followed the same procedure for other investments with Mr. Chain and Mr. Gutzman” whereby
 2 Kabins should tender Kabins investment money well before reviewing and executing a written
 3 contract. (Compl. ¶ 348)). Kabins alleged who, what, where, and when regarding the express
 4 fraud contained in the offering documents. (Compl. ¶¶ 371-405). Thus, in addition to the
 5 fraudulent omissions, Kabins alleged the details of the affirmative written fraudulent statements.
 6 (Compl. ¶¶ 378, 393, 406-408, 412-416). Finally, Kabins alleged other fraud-related facts
 7 answering who, what, where, and when as demonstrated by the allegations under the heading,
 8 “Additional Fraud-Related Facts.” (Compl. ¶¶ 406-420).

9 ***B. Kabins Allegations Regarding the Who, What, Where, and When of Mr. Gutzman’s***
 10 ***Misrepresentations***

11 Kabins’ Complaint initially alleges, generally, the who and what regarding fraud
 12 committed by Mr. Gutzman regarding two subsets of Inducement Misrepresentations:

13 Before Kabins invested money in Benessere and Cipriani, Mr. Gutzman personally, and as an agent for the
 14 Chain Consortium, the Managers, and the Millennium Entities, verified the Liquidity Misrepresentation and
 the Principal Protection Misrepresentations to Kabins for the purpose of inducing Kabins to invest in
 Benessere and Cipriani.

15 (Compl. ¶ 280). With respect to the Liquidity Misrepresentation, Kabins alleged that Gutzman:

16 told Kabins that the Millennium Investment Companies were “ground-floor” opportunities and that people
 17 “wanted to get in” and that the Managers for Kabins’ investments could find investors who would purchase
 Kabins’ equity interests for a reasonable price if Kabins wanted to sell at any time (the “Liquidity
 Misrepresentation”).

18 (Compl. ¶ 276). With respect to the Principal Protection Misrepresentation, Kabins alleged that
 19 Gutzman:

20 told Kabins that each of the Millennium Investment Companies was “not possibly going to lose money,”
 21 and that “the worst thing that could happen is that [Kabins] would get [Kabins’] money back,” misleading
 Kabins to perceive that Kabins’ invested principal was nearly as safe as a bank savings account or an
 22 investment in United States Treasury bills (the “Principal Protection Misrepresentation”).

(Compl. ¶ 268). Regarding when and where, Kabins' Complaint alleged that Gutzman communicated both of these misrepresentations at Kabins' place of business "on or about November 1, 2004" and "April 20, 2005," respectively:

- a. On or about November 1, 2004, Mr. Gutzman, Mr. Bergman and Mr. Chain fraudulently induced Kabins to agree to invest \$1,000,000.00 in Benessere.
- b. On or about April 20, 2005, Mr. Gutzman, Mr. Bergman and Mr. Chain fraudulently induced Kabins to agree to invest \$1,000,000.00 in Cipriani.

(Compl. ¶ 342 (a)-(b)). Thus, Kabins Complaint alleged who, what, where, and when regarding fraudulent statements by Mr. Gutzman himself.

III. ARGUMENT

A. *Gutzman is Liable for Gutzman's Co-Conspirators' Misdeeds, and Gutzman Failed to Demonstrate that Kabins' Complaint is Missing Any Elements, Allegations, or Specificity Required for Averments of Fraud Pursuant to Fed. R. Civ. P. Rule 9(b)*

Gutzman's Motion must be denied because Kabins alleged exacting details of who, what, where, and when the fraud occurred regarding Gutzman's co-conspirators and Mr. Gutzman himself, either one of which is sufficient to deny Gutzman's Motion.

Rule 9(b) . . . only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations. While mere conclusory allegations of fraud will not suffice, statements of the time, place and nature of the alleged fraudulent activities will. Plaintiffs' seventh claim, though not a model of clarity, was sufficiently specific to withstand attack on rule 9(b) grounds.

Bosse v. Crowell Collier and Macmillan, 565 F.2d 602, 611 (9th Cir. 1977). In the Ninth Circuit, allegations of "fraudulent activities" must include "the time, place and nature of the alleged fraud[.]" However, the quantity of "additional specificity . . . required depends on the nature of the individual case." *Arroyo v. Wheat*, 591 F.Supp. 141, 144 (D.C. Nev. 1984).

Notably, Gutzman did not offer a single case that could show how any of the allegations of fraud in Kabins' Complaint could be insufficient. Moreover, Gutzman failed to demonstrate that Kabins' Complaint is missing any allegations required to plead Kabins' causes of action for

1 fraud. Instead, Gutzman merely relied on *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
 2 (9th Cir.2003) and *Gowen v. Tiltware LLC*, 2009 WL 1441653, slip op., at 9 (D.Nev. May 19,
 3 2009), as support for Gutzman’s argument that the averments of fraud must meet the specificity
 4 requirements of Rule 9(b).¹¹ While Kabins does not dispute that Rule 9(b) applies to the fraud
 5 claims, the holdings of *Vess* and *Gowan* cannot be applied as Gutzman contends.

6 First, *Vess* stands for the opposite of Gutzman’s assertion that an entire “complaint
 7 against ... Defendants” should be subject to a heightened particularity standard. *Vess*, 317 F.3d
 8 at 1105 (9th Cir. 2003); Fed. R. Civ. P. 9(b). Instead, the holding in *Vess* instructs that fraud
 9 claims are subject to heightened pleading, while non-fraud claims are not subject to heightened
 10 pleading. *Id.* In *Vess*, the plaintiff had “allege[d] that Novartis conspired with APA and
 11 CHADD to increase the sales and sustain the price of Ritalin.” *Id.* There, the court undertook to
 12 analyze, for the first time, “the application of Rule 9(b) in a case where fraud is not an essential
 13 element of the claim.” *Id.* 1104. The *Vess* plaintiff argued, mistakenly, that Rule 9(b) did not
 14 apply to two of the “state claims under Cal. Civ. Code § 1770 and Cal. Bus. & Prof. Code §§
 15 17200 and 17500.” *Id.* The *Vess* court held that, because those two claims included
 16 “[a]verments of fraud,” the plaintiff’s allegations for those two claims must meet the
 17 requirements of Rule 9(b). *Id.* at 1105. Notably, the remaining claims that did “not aver fraud
 18 ... need not satisfy Rule 9(b).” *Id.* at 1105. Thus, the court “reverse[d] the district court’s
 19 dismissal of the entirety of *Vess*’s complaint against Novartis for failure to satisfy Rule 9(b)”
 20 because only the claims that included averments of fraud were subject to Rule 9(b)’s particularity

21
 22 ¹¹ Appropriately refined terms enhance brevity and reduce redundancy. But Gutzman offered absolutely
 no authority for Gutzman’s contention that Kabins “is not permitted to merely ‘lump’ together 35 ... Defendants.”
 Gutzman’s Motion at 8:10-11.

1 requirement. *Id.* at 1106. In sum, Rule 9(b) did not apply to claims where there were no
 2 averments of fraud.

3 *Gowan* undermines Gutzman's argument by instructing that, even though the plaintiff
 4 must *identify* the fraud defendants by name, the plaintiff is not required to identify every
 5 "statement[] made by each and every individual" who committed the fraud. *Gowen*, 2009 WL
 6 1441653 at 10. In *Gowen*, Ms. Cyalona Gowan, a celebrity poker player, sued "Tiltware LLC,
 7 its affiliates, and alleged shareholders or officers" for \$40 million based on an oral agreement.
 8 *Id.* at 1. Ms. Gowen alleged that she orally agreed to endorse Tiltware LLC in exchange for a
 9 1% ownership interest, but the defendants defrauded her. *Id.* at 10. Ms. Gowan's complaint
 10 failed to "identify any other Defendants," other than a single person, "by name, [and] allege the
 11 content of any false representations, or in what context they made them." *Id.* While the Court
 12 held that Ms. Gowan's fraud allegations against the remaining defendants were missing, most
 13 notably, the court stated that "the complaint need not identify false statements made by each and
 14 every individual[.]" *Id.* This is especially true in a "civil conspiracy" where "each participant
 15 [is] responsible as a contributory tortfeasor whether or not he actually committed the wrongful
 16 act." *Barney v. Aetna Casualty & Surety Co.*, 185 Cal.App.3d 966, 983, 230 Cal.Rptr. 215, 225
 17 (Cal. Ct. App. 1986) (citations omitted).¹² However, Gowen did not allege conspiracy. Instead,
 18 the *Gowan* plaintiff failed to identify, by name, any other participants in the fraud.

19
 20 ¹² Gutzman is liable for the fraud committed by Gutzman's co-conspirators:

21 The effect of charging unitary action inherent in the allegations of conspiratorial conduct is to implicate all
 22 participating in the common design and thus to fasten liability on those who agree to the plan to commit the wrong as
 well as those who actually carry it out. The significance of this form of action lies in the fact that it renders each
 participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of
 whether or not he was a direct actor and regardless of the degree of his activity."

Black v. Sullivan, 48 Cal.App.3d 557, 566 (Cal. Ct. App. 1975) (internal citations and quotes omitted).

1 In this case, unlike the plaintiff in *Vess*, Kabins does not argue that Rule 9(b) does not
 2 apply to averments of fraud; and, unlike the plaintiff in *Gowan*, Kabins' Complaint
 3 unequivocally alleges the identities of Gutzman's co-conspirators, Mr. Gutzman himself, and the
 4 distinguishable subgroups of Defendants to which Gutzman belongs.¹³ However, Kabins is not
 5 required to show Gutzman's separate fraudulent statements in the context of a conspiracy
 6 because Gutzman is liable for the acts of Gutzman's co-conspirators. *Gowan*, 2009 WL 1441653
 7 at 10; *Barney*, 185 Cal.App.3d at 983. Additionally, Kabins is not required to show the "when
 8 and where" of the voluminous fraudulent *omissions* because those allegations involve true
 9 statements that were never made. Instead, Rule 9(b) "only requires the identification of the
 10 circumstances constituting fraud so that the defendant can prepare an adequate answer from the
 11 allegations." *Bosse v. Crowell Collier and Macmillan*, 565 F.2d 602, 611 (9th Cir. 1977).

12 First, Kabins specifically alleged how "the misrepresentations were made," *Arroyo*, 591
 13 F.Supp. at 144 -145 (D.C.Nev. 1984), both orally and in writing. For example, regarding the
 14 first of the six Inducement Misrepresentations (oral misrepresentations connected to the fraud
 15 claims), Kabins initially alleged who and what:

16 Directly prior to every investment of money by a Kabins entity in a Millennium Investment Company, Mr.
 17 Bergman and Mr. Chain, as agents for the Chain Consortium, the Managers, and the Millennium Entities,
 18 told Kabins that each of the Millennium Investment Companies was, and would be, free of any debts, or
 "free and clear," such that Kabins' respective investments could not be subject to foreclosures or leverage
 risks associated with creditors (the "Free and Clear Misrepresentation").
 (Compl. ¶ 251; *see also*, Compl. ¶¶ 258, 268, 276, 281, 286 (the other five Inducement
 Misrepresentations, respectively)). Second, Kabins specifically alleged "[w]here and when the
 alleged misrepresentations were made," *Arroyo*, 591 F.Supp. at 144 -145, both orally and in

22 ¹³ For example, Mr. Gutzman and GEIII are included in the refined term, "Managers" (Compl. ¶ 217); and, Mr. Gutzman is one of the general partners of the "Chain Consortium" (Compl. ¶ 77).

1 writing. For example, regarding the each of the six Inducement Misrepresentations associated
 2 with each of the seven investments, Kabins alleged, when, where and who under the heading
 3 “Fraud in the Inducement Dates, Locations, and Identities”:

4 342. The Chain Consortium, the Managers, and the Millennium Entities agreed to send two individuals,
 5 Mr. Chain and Mr. Bergman, to Dr. Kabins’ Place of Business on the following dates in order to make the
 Inducement Misrepresentations as agents for the Chain Consortium, the Managers, and the Millennium
 Entities . . . as follows:

6 a. On or about November 1, 2004, Mr. Gutzman, Mr. Bergman and Mr. Chain fraudulently
 induced Kabins to agree to invest \$1,000,000.00 in Benessere.

7 b. On or about April 20, 2005, Mr. Gutzman, Mr. Bergman and Mr. Chain fraudulently induced
 8 Kabins to agree to invest \$1,000,000.00 in Cipriani.

9 c. On or about May 2, 2005, Mr. Bergman and Mr. Chain fraudulently induced Kabins to agree to
 invest \$1,000,000.00 in Gila Bend.

10 d. On or about February 10, 2006, Mr. Bergman and Mr. Chain fraudulently induced Kabins to
 agree to invest \$3,000,000.00 in Michael’s.

11 e. On or about April 1, 2006, Mr. Bergman and Mr. Chain fraudulently induced Kabins to agree to
 invest \$1,000,000.00 in 99th LLC.

12 f. On or about February 4, 2007, Mr. Bergman and Mr. Chain fraudulently induced Kabins to
 13 agree to invest an additional \$1,500,000.00 with 99th LLC.

14 g. On or about May 1, 2007, Mr. Bergman and Mr. Chain fraudulently induced Kabins to agree to
 invest \$2,000,000.00 with Capri I.

15 h. On or about July 25, 2007, Mr. Bergman and Mr. Chain fraudulently induced Kabins to agree to
 invest \$650,000.00 with Cottonwood.

16 343. Mr. Bergman and Mr. Chain used high-pressure sales tactics to induce Kabins into investing in
 17 Cottonwood on or about July 25, 2007, and falsely told Kabins on that date that Cottonwood would be an
 investment opportunity exclusive to Kabins and Mr. Chain. Mr. Bergman and Mr. Chain further falsely
 18 touted Cottonwood as subject to even lower risk and higher returns than Benessere, Cipriani, Gila Bend,
 Michael’s, 99th LLC, and Capri I.

19 (Compl. ¶¶ 342-343; *see also*, Compl. ¶¶ 344-345). Thus, Kabins first alleged who, what,
 20 where, and when regarding the Inducement Misrepresentations.

21 Kabins further alleged the specific fraud facts surrounding Kabins’ cause of action
 22 number eight, for fraud in the execution, by first alleging who and where:

After the Chain Consortium, the Managers, and the Millennium Entities obtained Kabins' respective invested money based on the Inducement Misrepresentations, Mr. Bergman and Mr. Chain, or agents for the Chain Consortium, would return to Dr. Kabins' Place of Business to obtain Kabins' signatures on investment documents.

(Compl. ¶ 350; *see also*, Compl. ¶¶ 351-355). Kabins further alleged when fraud in the execution occurred and what it was:

360. On or about April 20, 2006, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding 99th LLC.

* * *

363. On or about November 20, 2004, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding Benessere.

364. On or about May 20, 2007, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding Capri I.

365. On or about May 25, 2005, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding Cipriani.

366. On or about August 13, 2007, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding Cottonwood.

367. On or about May 25, 2005, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding Gila Bend.

368. On or about June 15, 2006, Mr. Chain and Mr. Bergman acquired Kabins' signature on documents that Mr. Chain and Mr. Bergman misrepresented as embodying Mr. Chain's and Mr. Bergman's oral Inducement Misrepresentations regarding Michael's.

(Compl. ¶¶ 360-368). Thus, Kabins clearly alleged who, what, when, and where regarding fraud in the execution.

Moreover, Kabins alleged sufficient details of complex layers of "Fraud in the Offering Documents" (Compl. ¶¶ 371-405) as well as "Additional Fraud-Related Facts" (Compl. ¶¶ 406-420). Kabins identified the interconnected features, or *layers*, of Gutzman's fraud with fine details. Initially, Gutzman and Gutzman's co-conspirators used the oral Inducement

1 Misrepresentations to tell Kabins, for example, that there were *no loans* associated with the
2 properties (Compl. ¶¶ 251). Nevertheless, the “fraud in the offering documents” partially
3 revealed that some of the prior Inducement Misrepresentations, upon which Kabins relied to
4 tender Kabins’ investment money, were false. (*See, e.g.*, Compl. ¶ 373). However, the written
5 documents fraudulently omitted material facts, for example, that the loans obtained for the
6 schemes were short-term, without a reasonable exit strategy, and subject to high risk of loss
7 (Compl. ¶¶ 374-375; *see also*, Compl. ¶¶ 374-376, 380-386, 388, 401, 405 (material omissions)).
8 Thus, even though Gutzman and Gutzman’s co-conspirators created conflicting versions of
9 fraudulent misrepresentations and omissions, the fraud remained undiscovered until Kabins
10 obtained substantial disclosures from the Defendants in December of 2008, when Kabins began
11 to reveal the entire scheme.

12 Gutzman’s co-conspirator liability extends throughout the entire scheme used to defraud
13 Kabins. The Complaint undoubtedly alleged that Mr. Gutzman and GEIII are co-conspirators
14 associated with subgroups of conspiring Defendants such as the Chain Consortium and the
15 Managers. Furthermore, Kabins sufficiently alleged that Mr. Gutzman conspired with each
16 group of Defendants associated with each of the seven investment company schemes:

17 (1) 99th & Indian School, LLC;

18 (2) Benessere, LLC;

19 (3) Capri I, LLC;

20 (4) Cipriani, LLC;

21 (5) Cottonwood, LLC;

22 (6) Gila Bend 384, LLC; and,

1 (7) Michael's Plaza, LLC.

2 (*See, e.g.*, Compl. ¶¶ 77, 555, 564, 573, 582, 591, 600, and 609, respectively). Kabins
3 undeniably alleged sufficient facts showing Gutzman's conspiracy relationship with the
4 Defendants. Thus, Gutzman is liable for misdeeds of Gutzman's co-conspirators.

5 In sum, in compliance with Rule 9(b) and Ninth Circuit case law, Kabins unequivocally
6 alleged who, what, where, and when regarding the complex fraudulent scheme implemented by
7 Gutzman and Gutzman's co-conspirators. The detailed allegations in Kabins' Complaint
8 demonstrate that Gutzman co-created a complex and multi-layered fraudulent scheme (including
9 a mass of material omissions) communicated orally and in writing. Gutzman and Gutzman's
10 conspirator's confusing scheme forced Kabins' to perform expansive due diligence to allege the
11 fraudulent scheme with sufficient detail. Notably, Gutzman's refusal to provide a single
12 example of an objectionable allegation in the Complaint infers that the allegations are indeed
13 sufficient. Kabins' Complaint correctly and precisely alleged Gutzman's role in the conspiracy
14 to create, implement, and benefit from the fraudulent scheme against Kabins. As a result,
15 Gutzman's Motion must be denied.

16 ***B. Gutzman Elected Not to Argue for Dismissal of 34 of the Claims Against Mr.***
17 ***Gutzman or 10 of the Claims Against GEIII, While Gutzman Inappropriately***
Conflated Parties and Claims

18 Gutzman should be required to answer every claim that Gutzman failed to identify or
19 enumerate: thirty-four claims against Mr. Gutzman, and ten claims against GEIII. Gutzman
20 confusingly conflated the all of the issues and claims based on Gutzman's utterly false statement
21 to the Court that "Plaintiffs have asserted 46 complex causes of action arising from at least 7
22 different real estate development projects against 'All Defendants' generally[.]" (Gutzman's

1 Motion at 5:20-22) (emphasis added). Gutzman’s Motion failed to distinguish between the forty-
 2 six claims against Mr. Gutzman and the twenty-two claims against GEIII. Instead, a closer
 3 examination of Gutzman’s Motion reveals that Gutzman only enumerated twelve claims for
 4 dismissal, while only six of those claims relate to GEIII. Thus, the Court should require that
 5 Gutzman file an answer to the remaining thirty-four claims against Mr. Gutzman¹⁴ and the
 6 remaining ten claims against GEIII, without further analysis of those claims.¹⁵

7 Specifically, Gutzman elected to argue for dismissal of the following enumerated claims
 8 against Gutzman: “Plaintiffs’ causes of action numbered six, seven, eight, nine, twelve, fourteen,
 9 fifteen, sixteen, seventeen, eighteen, nineteen, and twenty[.]” Gutzman’s Motion at 11:3-4.

10 With respect to those enumerated claims, Gutzman identifies the claims as follows:

11 Plaintiffs’ sixth, seventh, eighth, and ninth causes of action all allege fraud, including fraudulent and
 12 intentional misrepresentation; fraud in the inducement; fraud in the execution or inception; and fraudulent
 concealment. . . . Plaintiff’s 12th cause of action [is] for negligent misrepresentation.* * * Plaintiffs allege
 a series of claims for breaches of fiduciary duty/duty of loyalty.

14 ¹⁴ Gutzman failed to address the following thirty-four numbered claims: (1) federal securities fraud; (2)
 15 conspiracy to commit federal securities fraud; (3) civil conspiracy; (4) concert of action; (5) aiding and abetting;
 16 (10) conversion; (11) Nevada securities fraud; (13) negligent performance of an undertaking; (21-27) breach of the
 duty of care related to each of the seven investments; (28-34) breach of contract related to each of the seven
 17 investments; (35-41) breach of the duty of good faith and fair dealing related to each of the seven investments; (42)
 federal RICO; (43) conspiracy to violate RICO; (44) Nevada racketeering; (45) unjust enrichment; and (46)
 promissory estoppel.

18 ¹⁵ GEIII is a defendant for twenty-two claims—fewer than half of the total claims. Kabins’ Complaint
 19 clearly distinguishes the two defendants. For example, GE III is not one of the partners of the Chain Consortium
 (Compl. ¶ 77). Additionally, GE III was not one of the “Millennium Entities.” (Compl. ¶ 214). Instead, GEIII is
 20 one of the “Managers” (Compl. ¶ 217) and one of the “Gila Bend Defendants” (Compl. ¶ 600). Thus, GEIII is not a
 defendant to the following enumerated causes of action: (Nos. 14-18, 20) breach of the duty of loyalty against the
 21 99th Defendants; the Benessere Defendants; the Capri Defendants; the Cipriani Defendants; the Cottonwood
 Defendants; the Michael’s Defendants; (21-25, 27) breach of the duty of care against the 99th Defendants; the
 22 Benessere Defendants; the Capri Defendants; Cipriani Defendants; the Cottonwood Defendants; and the Michael’s
 Defendants; (28-32, 34) breach of contract against the 99th Defendants; the Benessere Defendants; the Capri
 Defendants; the Cipriani Defendants; the Cottonwood Defendants; and the Michael’s Defendants; (35-39, 41)
 breach of the covenant of good faith and fair dealing against the 99th Defendants; the Benessere Defendants; the
 Capri Defendants; the Cipriani Defendants; the Cottonwood Defendants; and the Michael’s Defendants. In total
 GEIII is *not* a defendant for twenty-four of the claims, while Mr. Gutzman is a defendant for all of those claims.

(Gutzman's Motion at 8:2-19, 9:3.) The remaining thirty-four claims against Gutzman, for which Gutzman failed to address, or even mention, are causes of action numbered 1-5, 10-11, 13, and 21-46, which include securities fraud claims, conspiracy-related claims,¹⁶ racketeering claims, and contract-based claims. Notably, Gutzman's Motion avoids any mention the words, "conspiracy," "conspire," or any related terms. Thus, because Gutzman failed to address any allegations or claims other than the twelve claims Gutzman enumerated, Gutzman should be required to answer those remaining claims without further analysis.

C. For Purposes of a Motion to Dismiss, Mr. Gutzman is a General Partner of the Chain Consortium; But Gutzman's Argument Only Addresses the Merits of the Claims Based on this Disputed Fact, Which Itself is Not Dispositive for Five of Seven Claims

Gutzman's Motion to dismiss the seven claims for breach of the duty of loyalty must be denied because Gutzman's entire argument relies exclusively on a single disputed fact regarding whether or not Mr. Gutzman was a general partner of the Chain Consortium (Gutzman's Motion at 10:16-24), which is insufficient for dismissal.¹⁷ *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (holding that a "trial court may not grant a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). Notably, Gutzman did not argue that Kabins failed to make out sufficient allegations for claims of breach of the duty of loyalty. "Certainly, a director of a corporation may breach his fiduciary duties by means of fraud." *Carstarphen v.*

¹⁶ As stated above, Kabins alleged that Gutzman was part of a civil conspiracy, and a general partnership, with individually-named Defendants and general partners: Mr. & Mrs. Jeff Chain, Gabriel Martinez, Esq., Mr. Todd W. Bergman, Mr. Allyn Povilaitis, and Mr. J. Matthew Kammeyer. (Compl ¶ 77). Kabins defines this general partnership as the "Chain Consortium." (*Id.*)

¹⁷ Fed. R. Civ. P. Rule 9(b) does not require particularity in the allegations supporting a claim for breach of the duty of loyalty.

1 *Milsner*, 594 F.Supp.2d 1201, 1206 (D.Nev. 2009). In sum, “the court must presume all factual
 2 allegations of the complaint to be true” for purposes of a motion to dismiss. *Id.* Thus, Mr.
 3 Gutzman *is* a general partner of the Chain Consortium, and Gutzman *is* a manager with respect
 4 to all seven investment schemes.¹⁸

5 1. *Gutzman is Not Required to Be a General Partner of the Chain*
 6 *Consortium to Be Liable for Breach of Loyalty for Five of the Seven*
 7 *Claims*

8 Mr. Gutzman’s status as a general partner of the Chain Consortium is not relevant for five
 9 of the seven breach-of-loyalty claims. To clarify, there are seven total claims for breach of the
 10 duty of loyalty—one for each of the schemes used to defraud Kabins—against Mr. Gutzman.
 11 One of those seven claims, regarding Gila Bend, is also against GEIII.¹⁹ Notably, Gutzman
 12 admitted that Mr. Gutzman is a “manager” for five of the seven companies associated with the
 13 breach-of-loyalty claims: “Mr. Gutzman has acted as a corporate manager for . . . *five* of the
 14 seven real estate developments described in Plaintiffs’ complaint.” (Gutzman’s Motion at 4:12-
 15 14) (emphasis added). Thus, there is no question that Mr. Gutzman is subject to liability for
 16 breach of the duty of loyalty, regardless of Gutzman’s assertion that Mr. Gutzman is not a
 17 general partner of the Chain Consortium, for the five of the breach-of-loyalty claims associated
 18 with the five “real estate development projects” for which Mr. Gutzman is admittedly a manager.
 19 Those five companies are:
 20
 21

22 ¹⁸ Compl. ¶ 77.

¹⁹ Compl. ¶ 600.

1 (1) 99th and Indian School, LLC;

2 (2) Benessere, LLC;

3 (3) Capri I, LLC;

4 (4) Cipriani, LLC; and,

5 (5) Gila Bend, LLC.

6 Thus, Mr. Gutzman is “certainly” subject to liability for five of the claims for breach of the duty
7 of loyalty. *Carstarphen*, 594 F.Supp.2d at 1206 (D.Nev. 2009). Moreover, GEIII is
8 unquestionably subject to liability for the claim against Gila Bend for breach of the duty of
9 loyalty and Gutzman did not argue otherwise. As result, those five claims against Gutzman
10 plainly cannot be dismissed.

11 2. *Gutzman’s Arguments Based Entirely on the Merits of the Claims Are*
12 *Inappropriate and Premature*

13 As demonstrated above, the only claims for breach of the duty of loyalty that Gutzman
14 truly disputes are those associated with two of the seven claims: (1) Cottonwood Retail, LLC;
15 and (2) Michael’s Plaza, LLC, exclusively. Notably, Gutzman did not argue that Kabins failed
16 to make out sufficient allegations for breach of the duty of loyalty. Instead, Gutzman argued the
17 merits of the case by claiming that Gutzman’s assertion of a factual dispute is the basis for
18 Gutzman’s Motion. As a result, the Court should presume that Kabins alleged sufficient
19 allegations for breach of the duty of loyalty.

20 In this case, Gutzman contends that the Kabins’ claim for breach of the duty of loyalty
21 should be dismissed because Gutzman disputes whether or not Mr. Gutzman is a general partner,
22 with six other individual-named Defendants, of the Chain Consortium. (Gutzman’s Motion p.

10:16-24). Thus, Gutzman's exclusive basis for dismissal is a disputed fact,²⁰ which simply cannot be a basis for a motion to dismiss. Therefore, the Court must deny Gutzman's Motion to dismiss Kabins' claims for breach of the duty of loyalty.

3. *Gutzman's Arguments Based Entirely on the Merits of the Claims Are Inappropriate and Premature for Findings of Fact Regarding Gutzman's Partnership with Other Defendants*

At most, Gutzman has only demonstrated that genuine issues of material facts exist regarding Kabins' allegations that Gutzman is a general partner with other individually-named Defendants. If the Court elects to treat Gutzman's Motion as a motion for summary judgment, then Kabins will offer additional evidence to show that Gutzman is a general partner with other individually-named Defendants based on, at a minimum, the sharing of profits and the shared objectives of each of the general partners. *See Radaker v. Scott*, 109 Nev. 653, 658, 855 P.2d 1037, 1040 (Nev. 1993); NRS 87.060; NRS 87.130. Notably, there is no formality required to form a general partnership. *Id.* Indeed, a person may be found to be a general partner despite express attempts to avoid a general partnership. *See, e.g., Kaufman-Brown Potato Co. v. Long*, 182 F.2d 594, 599 (9th Cir. 1950) (holding that "[i]t is immaterial that the parties deign not to call their relationship, or believe it not to be, a partnership, especially where as here the rights of third persons are involved"). A partnership exists when parties "do things which constitute a partnership." *Id.* For example, "the sharing of profits and losses are usual in partnership agreements and practices." *Id.*

²⁰ The only substance of Gutzman's Motion is denial of facts alleged by the Complaint. Gutzman twice claims that "Gutzman has never met Plaintiff Lori C. Kabins," who, of course, is not a party to this case (Gutzman's Motion at 4:1, 8:9); Gutzman asserts that Mr. Gutzman is not "a member of any Nevada general partnership with the other individual named Defendants" (Gutzman's Motion at 4:7-8); Gutzman asserts that Gutzman was not involved with two of the seven "real estate developments described in Plaintiffs' [C]omplaint" (Gutzman's Motion at 5:16-17); and Gutzman asserts that "not all 35 Defendants are involved in all of the [seven] projects" (Gutzman's Motion at 4:25). At most, Gutzman's assertions are mere denials of facts in alleged in the Complaint.

1 In this case, for purposes of a motion to dismiss, Kabins alleged that the partnership
 2 exists and Kabins alleged the foundational requirements for finding a partnership. For example,
 3 regarding sharing of profits, Kabins alleged:

4 The Chain Consortium . . . used the Millennium Investment Companies to receive large, undisclosed
 5 commissions immediately after Kabins invested capital in the respective Millennium Investment
 Companies.

6 (Compl. ¶ 226; *see also*, Compl. ¶¶ 219-220, 224-225, 226-229). Indeed, Kabins not only made
 7 out sufficient allegations of a partnership, Kabins also made out sufficient allegations that the
 8 general partners of the Chain Consortium were co-conspirators, who were part of a larger
 9 racketeering “enterprise.” (*See, e.g.*, Compl. ¶¶ 224, 228).²¹ Kabins alleged that further proof of
 10 the general partnership exists in the various company check registers. (Compl. ¶¶ 225, 237, 377,
 11 410, 425, and 506). Thus, Kabins can show additional extrinsic evidence of the Mr. Gutzman’s
 12 partnership so that the Court can conclude that there is a genuine issue of material fact.

13 4. *A Complaint Cannot Be Dismissed Pursuant to Rule 8(a) Based Merely on*
Length

14 Gutzman simply failed to make any cognizable argument for dismissal of the breach-of-
 15 loyalty-claims based on Rule 8(a)(2). Indeed, for a complaint to be dismissed under Rule
 16 8(a)(2), the “verbosity” and “redundancy” must be such that the “true substance, if any, is well
 17 disguised.” *Hearns v. San Bernardino Police Dept.*, 530 F.3d 1124, 1131 (9th Cir. 2008)
 18 (citations omitted). However, there is no “Ninth Circuit case” that has ever held “that a
 19 complaint may be found to be in violation of Rule 8(a) solely based on excessive length[.]” *Id.*
 20 Instead, the courts have “considered the nature of the underlying dispute,” the “number of
 21

22 ²¹ Moreover, Kabins alleged that Mr. Gutzman and GEIII’s relationship with the group of Defendants
 identified as “Managers.” (Compl. ¶ 217). The Managers includes the general partners of the Chain Consortium
 and certain named entity Defendants who were also co-conspirators.

1 defendants, and the number, type, and complexity of claims for relief.” *Bechler v. Macaluso*,
2 2008 WL 4145881, 2 (D. Or. 2008). Thus, claims cannot be dismissed based on a lengthy
3 complaint.

4 Gutzman fails to argue the correct standard for dismissal under Fed. R. Civ. P. 8(a)(2)
5 because Gutzman, in substance, merely asserts that Kabins’ entire Complaint is too lengthy,
6 which is insufficient for dismissal under Rule 8(a)(2). (Gutzman’s Motion 7:10-13). Thus, to
7 the extent that Gutzman relies on Rule 8(a)(2) as a basis for dismissal of the claims for breach of
8 the duty of loyalty, Gutzman’s Motion must be denied.

9 **IV. CONCLUSION**

10 For the reasons stated above, the Court should deny Gutzman’s Motion.

11
12 Respectfully submitted this 1st day of September, 2009.

13
14 GIBSON LOWRY BURRIS LLP

15 By /s/ J. Scott Burris
16 STEVEN A. GIBSON
17 Nevada Bar No. 6656
18 JODI DONETTA LOWRY
19 Nevada Bar No. 7798
20 J. SCOTT BURRIS
21 Nevada Bar No. 10529
22 City Center West
7201 West Lake Mead Boulevard, Suite 503
Las Vegas, Nevada 89128
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to Local Rule 5-1 of this Court, I certify that I am an employee of GIBSON LOWRY BURRIS LLP and that on this 1st day of September, 2009, I caused a correct electronic copy of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS', EDWARD GUTZMAN, III'S AND GE III, LLC'S, MOTION TO DISMISS to be served via CM/ECF.

By _____ /s/
An employee of GIBSON LOWRY BURRIS LLP